John Driscoll v Teleplan Technology Services Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–631 OF 2007
CHEW SOO HO JC
11 JANUARY 2012

Contract — Agreement — Settlement agreement — Plaintiff's employment with defendant terminated with immediate effect — Defendant contractually bound to pay plaintiff six months' salary in lieu of termination notice — Only three months' salary paid — Whether compensation amount parties later agreed to pay plaintiff for unfair dismissal included balance of salary — Whether any evidence to show plaintiff waived claim for balance salary

Under the plaintiff's employment contract with the defendant, the latter had to give him six months' notice if it wanted to terminate his services. The defendant decided to terminate the plaintiff with immediate effect allegedly on the ground of poor work performance. In its termination letter to the plaintiff, the defendant acknowledged that in lieu of giving termination notice it would pay him his six months' salary as per the employment contract. The plaintiff's salary then was RM100,000 per month. Instead of paying him a lump sum the defendant paid the plaintiff three monthly instalments of RM100,000 each and thereafter stopped payment because the plaintiff had filed a representation for wrongful dismissal and sought reinstatement under s 20 of the Industrial Relations Act 1967 ('Act'). The plaintiff filed the instant suit to recover the balance RM300,000 contractually payable to him upon his termination. The parties later entered into a settlement to resolve the dispute under s 20 of the IRA under which the defendant agreed to compensate the plaintiff for 'loss of office'. The terms of the settlement provided that with that compensation the plaintiff would have no further claims against the defendant or its subsidiaries in relation to any matters of his service in whatever forum or jurisdiction, whether the matters were within his consideration or otherwise. The defendant contended the settlement included the RM300,000 the plaintiff claimed in the instant suit. In its pleadings the defendant said the six months' salary it had agreed to pay the plaintiff was on an ex gratia basis without admission of liability since the plaintiff's service was terminated on ground of poor performance. The plaintiff conversely argued that the compensation agreed upon for his loss of office did not include the balance salary of RM300,000 which was contractually due to him.

Held, allowing the claim with costs:

(1) The memorandum of agreement between the parties did not indicate

that the settlement sum agreed to thereunder included the plaintiff's balance salary of RM300,000. On its face, the memorandum of agreement related solely to the plaintiff's representation under s 20 of the Act for dismissal without just cause or excuse and the compensation the parties agreed to was in relation to that dismissal or 'loss of office' (see para 9).

(2) From the plaintiff's conduct, although he had initially intimated the desirability of settling both his claim for reinstatement and his claim for the outstanding RM300,000 together, his subsequent conduct of insisting on the payment of the RM300,000 irrespective of the financial settlement on the Industrial Relations case showed explicitly he never intended to waive that claim (see para 16).

(3) The defendant was unable to produce any evidence to show the plaintiff had agreed to waive his claim for the RM300,000 nor any evidence the plaintiff had been informed the final sum offered under the settlement agreement included that sum. There was no meeting of minds between the parties to achieve a consensus as to the RM300,000 when the memorandum of agreement was signed (see para 17).

(4) The defendant's admission in its notice of termination of its liability to pay the RM600,000 in lieu of termination notice was unequivocal and in compliance with the agreed term in the contract of employment. The allegation that that sum was paid as ex gratia without admission of liability was totally inconsistent with the defendant's own admission (see para 6).

(5) The fact the plaintiff had not objected to the defendant's unilateral arrangement to pay the RM600,000 by six monthly payments did not change the fact the payment in lieu of notice had accrued upon the termination of his employment without notice (see para 6).

[Bahasa Malaysia summary

Di bawah kontrak pekerjaan plaintif dengan defendan, defendan perlu memberikannya notis enam bulan jika ia hendak menamatkan perkhidmatannya. Defendan memutuskan untuk memberhentikan plaintif dengan serta merta atas dakwaan prestasi kerja yang tidak memuaskan. Di dalam surat pemberhentiannya kepada plaintif, defendan mengakui bahawa sebagai ganti pemberian notis penamatan ia akan membayar gaji enam bulan kepadanya seperti dalam kontrak pekerjaan. Gaji plaintif pada masa itu adalah RM100,000 sebulan. Di sebalik membayar sekaligus, defendan membayar plaintif tiga bulan ansuran sebanyak RM100,000 setiap bulan dan kemudian memberhentikan pembayaran kerana plaintif telah memfailkan rujukan bagi pembuangan kerja secara salah dan memohon pengembalian kerja di bawah s 20 Akta Perhubungan Perusahaan 1967 ('Akta'). Plaintif memfailkan tindakan ini untuk mendapatkan semula baki RM300,000 yang perlu dibayar

secara kontrak kepadanya selepas penamatan kerjanya. Pihak-pihak kemudian memasuki penyelesaian untuk menyelesaikan pertikaian di bawah s 20 Akta di bawah mana defendan bersetuju untuk memberikan pampasan kepada plaintif bagi 'loss of office'. Terma-terma penyelesaian memperuntukkan bahawa dengan pampasan tersebut plaintif tidak lagi akan mempunyai tuntutan lanjut terhadap defendan atau anak syarikatnya berkaitan dengan apa-apa perkara berkaitan dengan perkhidmatannya dalam mana-mana forum atau bidang kuasa, sama ada perkara tersebut adalah dalam pertimbangan atau sebaliknya. Defendan menghujah bahawa penyelesaian termasuk RM300,000 yang plaintif tuntut di dalam guaman ini. Di dalam plidingnya, defendan menyatakan bahawa gaji enam bulan tersebut yang ia bersetuju membayar kepada plaintif adalah atas dasar ex gratia tanpa pengakuan kepada liabiliti oleh sebab perkhidmatan plaintif ditamatkan atas alasan prestasi yang tidak memuaskan. Plaintif sebaliknya menghujah bahawa pampasan yang dipersetujui bagi kehilangan kerja tidak termasuk baki gaji RM300,000 yang dihutang secara kontrak kepadanya.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Memorandum perjanjian antara pihak-pihak tidak menunjukkan bahawa jumlah penyelesaian yang dipersetujui di bawahnya termasuk baki gaji plaintif sejumlah RM300,000. Jelas bahawa memorandum perjanjian berkait khususnya kepada rujukan plaintif di bawah s 20 Akta bagi pembuangan kerja tanpa sebab atau alasan adil dan pampasan yang dipersetujui pihak-pihak adalah berkaitan dengan pembuangan atau 'loss of office' tersebut (lihat perenggan 9).

(2) Daripada tindakan plaintif, walaupun dia telah pada mulanya membayangkan keinginan untuk menyelesaikan kedua-dua tuntutan bagi pengambilan semula bekerja dan tuntutannya untuk tunggakan RM300,000 bersama, tindakan kemudiannya mendesak bayaran RM300,000 tanpa mengira penyelesaian kewangan atas kes Perhubungan Perusahaan menunjukkan secara jelas bahawa dia tidak pernah berniat untuk mengetepikan tuntutan tersebut (lihat perenggan 16).

(3) Defendan tidak boleh mengemukakan apa-apa keterangan untuk menunjukkan bahawa plaintif telah bersetuju untuk mengetepikan tuntutannya bagi RM300,000 dan tidak ada keterangan bahawa plaintif telah diberitahu bahawa jumlah akhir yang ditawarkan di bawah perjanjian penyelesaian termasuk jumlah tersebut. Tidak ada persetujuan di antara pihak-pihak untuk mencapai konsensus berkaitan dengan jumlah RM300,000 apabila memorandum perjanjian ditandatangani (lihat perenggan 17).

(4) Pengakuan defendan di dalam notis pemberhentiannya terhadap liabiliti untuk membayar RM600,000 sebagai ganti notis penamatan adalah jelas

dan mematuhi terma-terma yang dipersetujui di dalam kontrak pekerjaan. Dakwaan bahawa jumlah tersebut dibayar sebagai ex gratia tanpa pengakuan terhadap liabiliti adalah secara keseluruhannya tidak konsisten dengan pengakuan defendan sendiri (lihat perenggan 6).

(5) Fakta bahawa plaintif tidak membantah pengurusan defendan secara sebelah pihak untuk membayar jumlah RM600,000 secara ansuran bulanan tidak menukar fakta bahawa bayaran sebagai ganti notis telah terakru selepas penamatan kerjanya tanpa notis (lihat perenggan 6).]

Notes

For cases on settlement agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2830–2831.

Cases referred to

Barret Bros (Taxis) Ltd v Davies [1966] WLR 1334 (refd)
Eastern Mining & Metals Co Sdn Bhd v MM Ismail & Ors [1976] 1 MLJ 166; [1975] 1 LNS 204, FC (refd)
International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)

Legislation referred to

Contracts Act 1950 s 14
Evidence Act 1950 ss 102, 103, 115
Industrial Relations Act 1967 ss 20, 20(2), (3), 30(6)

YS Ong (Mureli Navaratnam) for the plaintiff.
Vijaya Vengopal (Shearn Delamore & Co) for the defendant.

Chew Soo Ho JC:

BRIEF FACTS

[1] The plaintiff was appointed vide the defendant's letter dated 18 December 2005 to the position of President of the Teleplan Storage Services Business of the defendant effective from 1 January 2006 on an annual salary of RM930,000 payable in 12 equal monthly payment of RM77,500 per month which will be increased to RM92,500 from 1 April 2006. In addition, the plaintiff would also be paid car allowance and other benefits. Vide a 'side letter to employment offer letter' dated 18 December 2005, the plaintiff's housing and school support would terminate effective from 31 March 2006 and in compensation thereof, the plaintiff's base salary would be increased to RM180,000 per year as regulated in the employment offer letter above.

[2] On 15 July 2007, the defendant by its letter of even date terminated the

plaintiff's employment allegedly as a result of consistent poor performance. Following the plaintiff's employment contract, the defendant would grant the agreed six month notice period for termination and would pay the plaintiff up to and including 15 January 2008. The defendant then paid the plaintiff the sum of RM100,000 a month for three months but stopped payment for the remaining three months of the notice period. The defendant stopped the payment for reason that the plaintiff had filed a representation for wrongful dismissal and claimed reinstatement pursuant to s 20 of the Industrial Relations Act 1967(Act 177) ('IRA'), in September 2007. In the mean time, the plaintiff had through his solicitors issued a notice of demand dated 25 September 2007 for the balance sum of RM300,000 which the defendant had accordingly replied through its solicitors' letter dated 11 October 2007 and this suit claiming RM300,000 was filed on 23 October 2007.

[3] Following the representation under s 20 of the IRA to the Industrial Relations Department, parties had negotiated for settlement and on 26 November 2007, the plaintiff and defendant's representative had signed a memorandum of agreement in the presence of the Chief Assistant Director of the Industrial Relations Penang to resolve the representation under s 20 of the IRA wherein the defendant agreed to pay the plaintiff the sum of 'compensation for the loss of office' amounting to USD317,628 as full and final settlement of the plaintiff's claim therein. Clause 4 in this memorandum of agreement states that upon the above settlement, the plaintiff certified that he would have no other claims against the defendant or its subsidiaries in relation to any matters of his service with the defendant in whatever forum and/or jurisdiction whether the matters were in his consideration or otherwise. The defendant contended that the above settlement included the balance sum of RM300,000 of notice period under cl 4 above. The plaintiff would have no other claim against the defendant arising from his employment with the defendant. The plaintiff however contended that the settlement was only in relation to the compensation for loss of office pursuant to s 20 of the IRA which does not include the plaintiff's contractual dues which the defendant is owing to the plaintiff. In addition, the memorandum of agreement does not make any reference to the RM300,000 contractual dues. Hence, the plaintiff claims for this sum of RM300,000 with interest and costs.

THE ISSUES

[4] The sole issue upon the above facts is whether by the memorandum of agreement dated 26 November 2007 between the parties herein and in particular vide cl 4 contained therein, the settlement achieved at the Industrial Relations Department had incorporated the sum of RM300,000 being the balance sum of the termination notice period or that the plaintiff had waived such claim through the aforesaid settlement in the memorandum of agreement

or otherwise.

FINDINGS

[5] The plaintiff's claim is basically based on the contractual term as provided in his initial contract of employment vide the defendant's letter of offer of employment dated 18 December 2005 which the plaintiff had signed his acceptance on 22 December 2005 (bundle B pp 3–6). The notice period for the termination of employment as stipulated in this contract of employment is six months with the defendant reserving the right to pay in lieu of notice (bundle B p 4 @ 'notice period' column). In the letter of termination dated 15 July 2007 issued by the defendant to the plaintiff terminating the plaintiff's service on the same day, it has, inter alia, stated the following in para 4:

> In agreement with your employment contract dated December 18,2005, executed by you on 18 January 2006, we will grant you the agreed 6 month notice period, and will continue to pay you up to and including 15th January 2008.

[6] Upon this termination and the unilateral agreement by the defendant to pay the plaintiff in lieu of the six month notice period in six monthly payments, the defendant commenced to pay the plaintiff his then monthly salary of RM100,000 per month continuously for three months after the termination but stopped the subsequent payment of the remaining three months on ground that the plaintiff had filed a representation in the Industrial Relations Department for wrongful dismissal and claiming reinstatement pursuant to s 20 of the IRA. The defendant pleaded that the sum of payment of RM600,000 which it agreed to pay to the plaintiff is on an ex gratia basis without any admission of liability since the plaintiff's service was terminated on ground of poor performance. I find that such allegation of the said payment being ex gratia without admission of liability has never been expressed by the defendant when it terminated the plaintiff's employment. Indeed, from the letter of termination at para 4 reproduced above, it is abundantly clear that the payment in lieu of the six month notice period is expressed to be in agreement with the plaintiff's contract of employment (bundle B pp 3–6) which the defendant had categorically referred to. The defendant agreed expressly with the six month notice period and would pay in lieu of that notice period effective from 15 July 2007 — the date of the termination — to 15 January 2008. The defendant had also honoured and paid but for three months only. There is thus no question of the said payment being ex gratia payment without any admission of liability as pleaded. In addition, the agreed facts by both parties as contained in bundle D produced in court show that parties have agreed that in accordance with the terms of the plaintiff's letter of offer, the defendant agrees to pay the plaintiff the sum of RM600,000 as payment in lieu of the notice of termination as seen in the defendant's notice of termination of

15 July 2007. The admission of liability of the RM600,000 in lieu of termination notice is unequivocal. The allegation of it being so paid as ex gratia without admission of liability is seen to be totally inconsistent with the defendant's own admission. I find that the payment of six months salary in lieu of notice amounting to RM600,000 is in compliance with the agreed contractual term as stipulated in the plaintiff's contract of employment. Since the defendant had admitted that fact, it must be estopped from now contending otherwise, that such agreement to pay is not based on the contractual term but ex gratia; see s 115 of the Evidence Act 1950, *Lai Yoke Ngan v Chin Teck Kwee* [1997] 2 MLJ 565 (FC). By this clear admission, I am of the view that the sum of RM600,000 had accrued to the plaintiff as at 15 July 2007 in that by terminating the plaintiff with immediate effect without the agreed six months notice being given to the plaintiff, the defendant ought at that time to have paid the plaintiff six months of salary in lieu of notice as agreed vide the contract of employment. The fact that the plaintiff had not objected to the defendant's unilateral arrangement to pay the RM600,000 by six monthly payments commencing 15 July 2007–15 January 2008, does not change the fact that the payment in lieu of notice had accrued upon the termination of his employment without notice. It appears that the plaintiff had no choice in the circumstances to reject that arrangement. He explained that he would rather receive the payment though by way of monthly instalment as he was out of job then, than to resort to legal action to claim the sum. This explanation is reasonable. Conduct of the defendant in making payment for three continuous months thereafter was none other than a confirmation of its obligation under the plaintiff's contract of employment when it elected to terminate plaintiff's employment with immediate effect. The balance sum of RM300,000 being part of the RM600,000 would therefore have accrued as a debt owing by the defendant to the plaintiff when defendant stopped the payment. In the circumstances, unless such sum is agreed to have been incorporated in the subsequent settlement agreement in the form of the memorandum of agreement (bundle B pp 7–8) or that the plaintiff had waived such sum expressly, the said sum of RM300,000 remains a debt still due and owing by the defendant to the plaintiff pursuant to the said contract of service.

[7] The main thrust of the defence is that the memorandum of agreement entered into between the plaintiff and the representative of the defendant before the Chief Assistant Director of the Industrial Relations Department on 26 November 2007 (bundle D pp 7–8) is a full and final settlement including the RM300,000 that it had not paid. Clause 4 which reads:

> Berikutan penyelesaian ini, Perayu mengesahkan bahawa dia tiada lagi apa-apa tuntutan terhadap Syarikat/Majikan dan/atau berkaitan anak syarikat-anak syarikat berkenaan apa-apa perkara berkenaan perkhidmatannya dengan Syarikat / Majikan dalam apa-apa forum dan /atau bidang kuasa, samada perkara-perkara tersebut dalam pertimbangannya, atau sebaliknya.

[8] By this clause, the defendant contended that the plaintiff had affirmed that with this settlement in the Industrial Relations Department, plaintiff would not have any claims against the defendant over whatever matters in relation to his service with the defendant. The plaintiff therefore as contended is estopped from claiming this sum of RM300,000 from the defendant. Further, the defendant through its sole witness SD1 had testified that the defendant had initially offered to settle with payment of nine months salary but having taken into consideration the RM300,000 which was due to the plaintiff, the defendant offered to settle with 12 months of the plaintiff's salary. Hence the memorandum of agreement was entered to settle with 12 months salary which had included the RM300,000 being three months salary. On this aspect of SD1's evidence, one salient fact that can be drawn is that the defendant has endorsed the sum of RM300,000 being due and owing to the plaintiff which the defendant ought to account for it. The defendant being the party who asserts this fact that they had included this sum of RM300,000 in this settlement agreement and more importantly as agreed by the plaintiff must necessarily prove so in accordance with ss 102 and 103 of the Evidence Act 1950 on its onus of proof. If it is only the defendant's perception without the consent of the plaintiff, parties could not be said to be ad idem to conclude an agreement. The plaintiff, conversely testified that the RM300,000 is never part of the agreed compensation in lieu of reinstatement for the loss of his office as clearly stated in para 3 of the memorandum of agreement. The plaintiff explained that he had through his solicitors' letter dated 25 September 2007 written to demand for the sum of RM300,000 (bundle B pp 17–18) and the defendant had vide its solicitors' letter dated 11 October 2007 (bundle B pp 19–20) replied that the defendant had every right to stop payments as a result of the notification dated 7 September 2007 from the Industrial Relations Department and that the defendant was at no material time in fact and in law contractually obliged to make any payment to the plaintiff pursuant to his dismissal on ground of poor performance. The plaintiff therefore contended that it is totally untrue that the defendant would have accounted the RM300,000 in the settlement agreement in the Industrial Relations Department which the defendant had denied its obligation to pay.

[9] From the contention by the parties, the defendant asserted that the settlement included the RM300,000 while the plaintiff said in the negative. sieving through the memorandum of agreement, one undenied fact is that there is an absolute silence on this sum of RM300,000 being the balance sum of the contractual notice period of six months that had been included in the settlement in this memorandum. SD1 who was cross-examined had to admit it as a fact. The Industrial Relations Department and/or the said chief assistant director were not called to confirm the defendant's assertion that the settlement of USD317,628 included the RM300,000 of the six month contractual notice being its balance sum. No letter or email from the defendant is produced to show that the offer for settlement of allegedly 12 months was to include the

sum of RM300,000 still outstanding. No letter or email is adduced as evidence to prove that the plaintiff had been communicated with such fact and he had agreed to it. There is undoubtedly insufficient evidence from the defendant to satisfy its onus of proof: *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC). The wordings of the memorandum of agreement states specifically as 'compensation for the loss of office' which is pursuant to s 20 of the IRA without any word which indicates or enables a reasonable inference to be drawn that it also includes any other sum still due and owing by the defendant to the plaintiff. On the face of this memorandum of agreement, it can only be said that the settlement is solely in relation to the plaintiff's claim or representation under s 20 of the IRA which is commonly known as dismissal without just cause or excuse and the compensation agreed by both parties is in relation to such dismissal or 'loss of office' as it is termed in the memorandum. The question of the RM300,000 has never been indicated to signify that the agreement to pay and its acceptance of the sum of USD317,628 had included the said sum of RM300,000. Section 20(2) of the IRA provides that:

> 20(2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at …

[10] The role of the Director General ('DG') of the Industrial Relations Department under s 20(2) of the IRA above is to take such steps to facilitate an expeditious settlement. The final agreement with all its terms must be by the parties. I find no reason why it could not be expressed in the said memorandum of agreement that the sum of USD317,628 would include the balance notice sum of RM300,000. Even though it may be argued that the sum of RM300,000 is derived from the contractual term which does not fall within s 20 of the IRA, I am of the view that such contention on the jurisdiction and power of the DG of the Industrial Relations Department does not arise as the DG does not adjudicate on the matter of dismissal which will be vested in the Industrial Court but to facilitate parties to arrive at a settlement. The ultimate terms of agreement are to be agreed upon by both parties which bind them. The RM300,000 became due and payable as a result of the plaintiff's dismissal and it is a matter related to dismissal. Therefore, putting a clause to the effect that the settlement includes the sum of RM300,000 being the balance sum in lieu of the notice of termination or dismissal is, to this court, a proper course if indeed that was the actual intention of the parties. The main aim of s 20(2) of the IRA is to facilitate the parties in dispute to achieve an amicable and expeditious settlement. In doing so, I do not think that the DG is restricted solely to the relief claimed by the plaintiff in the representation but may include any other matter agreed upon by the parties for the purpose of settling the representation or the whole dispute between the parties. Anology can be drawn from s 30(6) of the IRA which applies to the Industrial Court. It provides:

30(6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under subsection 20 (3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the refence to it under section 20 (3).

[11] Since the Industrial Court is not restricted to adjudicate and make award on the specific relief claimed in respect of dismissal under s 20(3) of the IRA, it is only right that the DG of Industrial Relations Department ought not to be restricted to facilitate a settlement which may include matter or thing which he thinks necessary or expedient for settling the representation under s 20(2) of the IRA. The Industrial Relations Act 1967 is a social legislation. Equity and good conscience should prevail over all technicalities. I do not find it objectionable that the RM300,000, if it is in fact agreed upon by both parties to have been included in the settlement sum, is so stated to reflect the true intention of the parties bearing in mind that the memorandum is the agreement between the parties and there is certainly no issue of the DG embarking to decide in whatever way on the issue of contract law. To reiterate, the sum of RM600,000 had accrued on 15 July 2007 upon the dismissal of the plaintiff under the term of the contract of the plaintiff's employment. When RM300,000 had remained unpaid, it became a debt due and owing by the defendant to the plaintiff.

[12] Unless this sum is specifically agreed upon and expressed in the memorandum of agreement in the Industrial Relations Department to be inclusive in the settlement sum, it is unconvincing and this court cannot conclude that such sum, in the absence of any other clear evidence, has been incorporated in the said settlement sum.

[13] The defendant had referred to plaintiff's email dated 8 October 2007 (bundle B pp 21–22), 11 October 2007 (bundle C p 1), 16 October 2007 (bundle C p 3), 24 October 2007 (bundle C p 2) and 1 November 2007 (bundle C p 4) to the defendant in the course of negotiation for settlement to submit that the agreement entered into on 26 November 2007 is the full and final settlement of all claims by the plaintiff against the defendant in connection with his service or employment with the defendant. The defendant contended that the plaintiff should be estopped from proceeding with this claim citing *Eastern Mining & Metals Co Sdn Bhd v MM Ismail & Ors* [1976] 1 MLJ 166; [1975] 1 LNS 204 which nevertheless is distinguishable on the facts as it is a case of retrenchment and not dismissal or termination of employment as in the case of the plaintiff herein; hence the notice period for the termination of employment did not arise on ground of retrenchment which was governed by the collective agreement wherein the plaintiff there would be paid retrenchment benefit and the company/employer had in addition paid

A one month salary as ex gratia payment to the plaintiff. This leads to the consideration of cl 4 in the memorandum of agreement between the plaintiff and the defendant whether by this said settlement agreement and by agreeing that plaintiff will not have any claim against the defendant in connection with his service with the defendant whether the matters are still under consideration B or otherwise, constitute a waiver of his claim for the sum of RM300,000. Should the plaintiff be estopped from claiming this sum? Perusing through all relevant emails referred to above, it is no doubt that the plaintiff had indicated his desire to settle all matters ie the claim for reinstatement and the arrears of the payment in lieu of the six months notice. However, to reiterate, there is no C e-mail or correspondence from the defendant to show that its offer for settlement did incorporate the sum of RM300,000 nor that the plaintiff had accepted the settlement to include the RM300,000. In the plaintiff's email dated 8 October 2007 at 12:22:05 to SD1 of the defendant, the plaintiff had informed that he had started proceedings in the High Court to obtain the three D months salary still owing to him which is a separate matter from the dismissal case in the Industrial Relations Department. He had apparently declined the offer of compensation of nine months salary and expressed this doubt whether that had included the three months salary due to him. Subsequent to this email, the defendant's solicitor had replied to the plaintiff's notice of demand E for the three months outstanding vide letter dated 11 October 2007 indicating that the defendant was not contractually obliged to make any payment to the plaintiff for his dismissal on ground of poor performance. Even in the plaintiff's email to Mr Gotthard Hau, the chief financial officer of the defendant, the plaintiffs request for settlement was for 24 months plus the F three months outstanding ie a total of 27 months. From the plaintiff's subsequent email dated 8 November 2007 at 3:05pm to Mr Mark, the CEO of the defendant (exh P3), again the plaintiff had made it clear as follows:

> G Mark, irrespective of the financial settlement we have agreed on my termination I still want the three months salary that is owing to me and which should have been paid to me in a lump sum on my termination as per my contract. You changed the terms of my contract in that termination letter and paid me monthly up until I went to the IRB and then you ceased all payment altogether.
>
> I will continue to pursue this payment through legal channels.
>
> H …

[14] From the action being filed to claim this sum of RM300,000 and the above email — exh P3, the intention of the plaintiff is amply clear that the settlement is distinct from the sum of RM300,000 which had been I outstanding for which the plaintiff said in clear words 'I still want the three months salary that is owing to me' 'irrespective of the financial settlement we have agreed on my termination'. From the plaintiff's email dated 8 October 2007 @ 12:22:05 (bundle B p 21), the defendant's solicitors' reply dated 11 October 2007 (bundle B pp 19–20) to the notice of demand dated

25 September 2007 from the plaintiff's solicitors claiming the RM300,000 (bundle B pp 17–18) and the plaintiff's email — exh P3, the defendant must be well aware that the plaintiff had taken separate legal action to recover the said sum of RM300,000 against them. That being the case and if it is true that the memorandum of agreement does include the sum of RM300,000, it is only conceivable and plausible for the defendant to demand the plaintiff to withdraw his action or to file a notice of discontinuance of the said action instituted or filed or alternatively to have it so worded expressly in cl 4 that any existing or pending claim by the plaintiff against the defendant shall be withdrawn forthwith. No such words appear in cl 4. Translating cl 4 into English (through court Malay interpreter), it reads:

> Following this settlement, Appellant confirms that he has no longer any claim against the Company/Employer and/or in connection with the subsidiary companies in respect of any matters relating to this service with the Company / Employer in any forum and/or jurisdiction, whether the said matters are under consideration or otherwise.

[15] From the wordings of this cl 4, it appears to me that it refers more to any future claim because of the part of the sentence which says 'any matters relating to his service with the Company/Employer whether the said matters are under consideration or otherwise'. Be that as it may, the sum of RM300,000 is outstanding sum owing to the plaintiff and it is a known fact to the defendant. Therefore, there must be clear provision in the memorandum of agreement to say to that effect that by that settlement, the plaintiff has waived his claim for the RM300,000 which is due and owing to him by the defendant. The clear intention must be explicit to reflect the waiver of an existing outstanding sum. It does not suffice to pin on a general clause to construe that it means to cover a specific known fact. In *Barret Bros (Taxis) Ltd v Davies* [1966] WLR 1334 as cited by learned counsel for the defendant, Lord Denning has explained the principle of waiver as follow:

> The principle of waiver is simply this. If one party by his conduct leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do.

[16] From the conduct of the plaintiff, although he had initially intimated the desirability to settle both his claim for reinstatement and his claim for the outstanding RM300,000 together, his subsequent conduct of insisting on the payment of RM300,000 irrespective of the financial settlement of the industrial relations case vide exh P3 has shown explicitly that this sum of RM300,000 was never intended to be waived by him. The defendant is unable to produce any evidence to show that the plaintiff had agreed to waive this

claim nor any evidence that the plaintiff was duly informed that the final sum offered for settlement included the RM300,000. The Chief Assistant Director of Industrial Relations Department before whom the memorandum was signed was not called. She being an independent witness would most probably be able to enlighten this court whether the settlement includes the RM300,000 or whether cl 4 is intended by the parties to be a waiver by the plaintiff of his existing claim or it only refers to any future claim. Even if this court were to err to hold the view that cl 4 refers to future claims by the plaintiff, there is still a doubt whether it meant to cover the existing or pending claim of the plaintiff which he had already filed in court at the material time. Benefit of the doubt should in such circumstances be resolved in favour of the plaintiff.

[17] Having considered all evidence coupled with the conduct of the parties, I find that there is no meeting of the mind between the plaintiff and the defendant to achieve the consensus as to the outstanding balance of RM300,000 when the memorandum of agreement was signed. It appears that defendant was most probably under a mistaken conception that it would include the said outstanding sum while the plaintiff was asserting that the outstanding sum was excluded. Mistake will vitiate free consent: s 14 of the Contracts Act 1950. I am inclined to hold that there was no consensus in the memorandum of agreement to include in the settlement of the outstanding sum of RM300,000. On the facts and evidence as a whole, I hold that the plaintiff has proved on a balance of probabilities that the sum of RM300,000 was due and owing by the defendant to him pursuant to his contract of employment with the defendant and that the memorandum of agreement dated 27 November 2007 does not incorporate the settlement of the said outstanding sum nor does it constitute plaintiff's waiver of such sum vide cl 4 therein. Consequently, I allow the plaintiff's claim for the sum of RM300,000 with interest at the rate of 4% from the date of judgment to the date of realisation and costs of RM7,000.

Claim allowed with costs.

Reported by Ashok Kumar